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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 580

Case No. 629: PALERMO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Hubert Thierry;

Whereas at the request of Amanda Palermo, a former staff member of the Regional Office for Southern Latin America of the United Nations High Commissioner for Refugees, hereinafter referred to as UNHCR, the President of the Tribunal, with the agreement of the Respondent, extended to 30 September 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 16 July 1991, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 4 November 1991, the Applicant, after making the necessary corrections, again filed an application containing the following pleas:

"III. PLEAS

III.1. Under the terms of the staff rule 104.3, the Appellant requests her re-employment in another Agency of the United Nations System, since such a decision would be the one which would allow to apply more reasonably and equitably the recommendation contained in the Report to the Secretary-General: JAB [Joint Appeals Board] Case No. 148.

At present, the Appellant occupies the position of Information Officer at the UNDP Office in Buenos Aires, on [a] temporary basis, and requests the Administrative Tribunal [to order] her re-employment in that Office with an indefinite type of contract, or its equivalent (as she had until her 'unjust' - as stated by the JAB - separation from service) since there is neither de facto nor de jure difficulty to resolve such a re-employment.

III.2. Even considering hypothetically the total impossibility of resolving such re-employment, the indemnity offered was in no way the legal one nor the one which would reasonably allow to compensate such a termination of her appointment.

This is why, even insisting on the fact that the re-employment on an indefinite type of contract basis (or its equivalent) should be the resolution to be adopted, an indemnity amount should be determined, in accordance with the de facto and de jure background of the case."

Whereas the Respondent filed his answer on 10 March 1992;

Whereas the Applicant filed written observations on 27 August 1992;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Regional Office for Southern Latin America of the UNHCR in Buenos Aires on 13 March 1975, as a local Secretary under a short-term appointment. She served thereafter intermittently on further short-term appointments until 1 August 1979, when she was offered a one year fixed-term appointment at the GL-5, step II level as a Senior Secretary. Her appointment was successively extended for further fixed-term periods until 1 May 1981, when she was offered an indefinite appointment as a Junior Administrative Assistant at the GL-6, step I level. On 1 October 1982, the Applicant was promoted to the GL-7 level as Secretary and Assistant to the Regional Representative. On 1 July 1985, she became a Public Information Assistant Secretary in a post at the National Professional Officer level.

The Annual Staffing Review in 1986 recommended that, in view of the financial crisis which UNHCR was facing, the Applicant's post of Public Information Assistant should be redeployed to Dakar, Senegal, as of 1 January 1987. The High Commissioner endorsed the recommendation and, in a letter dated 22 October 1986, the Head, Personnel Service, informed the Applicant of the decision to abolish her post and to terminate her appointment, with effect from 31 December 1986, under the terms of staff regulation 9.1 (a). The Applicant was also informed that she would be paid a termination indemnity in accordance with staff rule 109.4 and annex III to the Staff Regulations.

On 23 December 1986, the Applicant requested the Secretary-General to review the administrative decision to terminate her appointment, essentially on the grounds that "there existed and still exist various solutions which would assure the achievement of the objective of UNHCR (reduction of annual budget and abolition of Public Information Assistant post)" other than the termination of her appointment. She therefore set out a series of proposals to reassign her to other functions within the Regional Office.

In a reply dated 3 April 1987, the Assistant Secretary-General for Human Resources Management informed the Applicant that the administrative decision to terminate her indefinite appointment with UNHCR would be maintained. He stated inter alia:

> "As you point out in your request for review, the post to which you sought reassignment was a Junior Programme Assistant post at the G-6 level, encumbered by a staff member on an indefinite appointment on Leave without Pay. During the Leave without Pay, a fixed-term official, at the G-5 level, was performing the functions of the post, which involved the administration of some 50 projects in the region covered by the Regional Office in Argentina. No vacant G-7 post existed at the duty station, nor were funds available to pay a G-7 salary for the G-6 post. An Argentina G-7 salary cannot be financed from another country, nor could the excess be charged against a post elsewhere. The regular incumbent of the G-6 junior Programme Assistant Post was of virtually

equivalent seniority to yourself. I am satisfied that your claim to this post was given full and fair consideration, and rejected for sound administrative and financial reasons. I am also satisfied that no vacant G-7 post existed at your duty station, nor was there a G-7 post occupied by a fixed-term staff member."

On 10 April 1987, the Applicant lodged in appeal with the Joint Appeals Board (JAB). The Board adopted its report on 7 February 1991. Its conclusions and recommendations read as follows:

"CONCLUSIONS AND RECOMMENDATIONS

8. The Panel decided that the appeal was receivable as the time-limits relating to the submission of the appeal had been respected apart from a negligible delay. The Panel also decided that it was competent as this appeal relates to an administrative decision within the meaning of staff rule 111.2.

9. In deciding upon the merits of the case, the Panel has taken note of staff rule 109.1 and of the general principles laid down by the Administrative Tribunal in Judgement No. 2 Aubert and 14 others which reads in part as follows:

'The Tribunal, while convinced on these grounds of the right of the Administration, when necessity arises to effect reductions of posts and, if appropriate, to abolish either individual posts or categories of posts and substitute others more suitable for the carrying out of necessary duties in the changed circumstances, is none the less deeply impressed by the necessity of effecting such reductions or changes in a manner which minimizes the sacrifices consequently inflicted upon individual officers and which preserves as far as may be possible in the circumstances the principle of security of tenure in accordance with the contracts applicable to individual cases.'

10. The Panel did not find convincing here the Respondent's contention that the Appellant did not have suitable qualifications and experience for the post of Junior Programme Officer to which she aspired. The description of the duties attached to the post, the fact that it was later downgraded, the appointment of a less qualified person to the

post, and the statement contained in the Regional Representative's letter of 30 June that the Appellant was 'manifestly overqualified' for the post are all evidence to the contrary.

11. If the Panel had wished to dwell more on whether or not the Appellant should have been assigned to that specific post, it might have found that the Appellant had a priority claim thereto. Even if the Panel was prepared to assign less weight to this question, however, it considers that the totality of the Respondent's actions does not indicate that the Respondent showed a sufficient degree of commitment to the exhaustion of all possibilities of solving the unprovoked employment difficulties of a staff member who had provided long and satisfactory service.

Recommendation

12. The Panel, therefore, recommends to the Secretary-General that the Appellant be re-employed in the service of the High Commissioner for Refugees in any appropriate post that may be available. The Panel does not underestimate the obstacles that may exist relating to the re-employment of the Appellant, but it wishes to observe that re-employment should not be viewed as an a priori impossibility inasmuch as it could, in certain cases, provide a reasonable and cost-effective solution serving the legitimate interests of both sides. If, nevertheless, such a course of action is not possible, the Panel would recommend that the Appellant be granted compensation for the termination of her indefinite appointment, equivalent to four months of her salary at the time of separation from service."

On 21 February 1991, the Under-Secretary-General for Administration and Management informed the Applicant as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. Although he has some reservations as to the Board's conclusions, he has decided to accept the Board's recommendation.

Accordingly, the Office of the High Commissioner for Refugees is being requested to consider the possibility of re-employing you in an appropriate post and to advise me within a period of one month if this is feasible or not. If

such course of action is not possible, payment of four months net salary at the rate in effect at the time of your separation from service should be made to you.

..."

On 27 March 1991, the Deputy Director, Office of the Under-Secretary-General for Administration and Management, informed the Applicant that UNHCR had not found it possible to re-employ her and that instructions had been issued for payment of the compensation described in the letter of 21 February 1991.

In a letter dated 20 June 1991, the Applicant informed the Regional Representative of UNHCR in South America of her refusal to accept payment of the termination indemnity based on four months' net base salary at the rate applicable on 31 December 1986.

On 4 November 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are as follows:

1. The Applicant was improperly separated as there was an existing post in the UNHCR local office which she could have filled.

2. The amount of the termination indemnity offered to the Applicant is inadequate since it does not take into account the loss of benefits to which she would have been entitled had she not been separated from the Organization.

Whereas the Respondent's principal contention is:

The decision to terminate the Applicant's appointment on account of abolition of post was within the authority of the High Commissioner for Refugees, and was properly motivated. Although the efforts to find the Applicant another post may not have fully respected her rights, the compensation paid to her by the Respondent, on the recommendation of the JAB, adequately compensated the Applicant for that shortcoming.

The Tribunal, having deliberated from 28 October to 18 November 1992, now pronounces the following judgement:

I. The Tribunal takes note of the unanimous recommendation of the Joint Appeals Board (JAB), calling for the re-employment of the Applicant by the Office of the United Nations High Commissioner for Refugees (UNHCR). While not underestimating the obstacles that might exist to the re-employment of a staff member whose post had been abolished, the JAB observed that re-employment in the case of a staff member holding an indefinite appointment should not be viewed as an a priori impossibility. In certain cases re-employment could provide the most reasonable and cost-effective solution serving the interests of Administration and staff member alike. The Tribunal shares this view. In addition, the JAB recommended that, if the staff member was not re-employed with UNHCR, she should be granted compensation for termination of her indefinite appointment equivalent to four months' salary.

The Secretary-General accepted the Board's recommendation, thereby acknowledging that the Administration had a responsibility in the matter. The Applicant, however, refused to accept the compensation awarded to her and sought re-employment under an indefinite appointment, if not with UNHCR, with some other organ of the United Nations system. The Applicant is currently employed on a short-term contract as an Information Officer with the United Nations Development Programme (UNDP) in Buenos Aires. What she seeks therefore is the granting of tenure in the form of an indefinite appointment such as she held with UNHCR before she was terminated.

II. The Tribunal is required to rule:

(1) On the Applicant's request that she be re-employed under an indefinite appointment with an organ other than UNHCR, preferably UNDP.

(2) On the amount of the compensation payable as a result of the Administration's failure to fulfil its obligation to make an effort to secure the Applicant's re-employment.

The Tribunal concurs with the JAB that following the abolition of the Applicant's post all possible steps were not taken with a view to her re-employment. In any event, the Tribunal considers that, in view of the Applicant's performance and length of service with UNHCR, the latter should further pursue its efforts to ensure that, to the extent possible, the Applicant's career continues along the path which she could reasonably expect it to have taken.

III. The Tribunal shares the Respondent's view that the termination of the appointment of a staff member holding a post with a specific body of the United Nations system on grounds of abolition of post does not create an entitlement to re-employment elsewhere in the system. Nevertheless, in the present case, the Applicant has in fact been rehired by UNDP, although under a short-term contract. Resolution of the situation resulting from her dismissal by UNHCR could be achieved by granting the Applicant an indefinite appointment with UNDP or some other agency, which would restore to her the status she had prior to her dismissal. The Tribunal therefore orders that efforts be made by the Respondent to secure an indefinite appointment for the Applicant, provided that a post suited to her qualifications can be found.

IV. Furthermore, in the light of the findings set out in paragraph III, the Tribunal holds that the compensation granted the Applicant by the JAB should be increased to six months' net salary at the rate in effect on the date of her separation from service.

V. For the foregoing reasons, the Tribunal orders:

1. That steps be taken by the Respondent with UNDP and other organs, aimed at securing an indefinite appointment for the Applicant, provided that a post suited to her qualifications can be found.

2. That the compensation to the Applicant, recommended by the JAB, to which the Secretary-General has agreed, be increased to six months of the net salary which was payable on the date of her separation from service, at its US dollar equivalent calculated on the basis of the exchange rate in effect on 31 December 1986.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Hubert THIERRY
Member

New York, 18 November 1992

R. Maria VICIEN-MILBURN
Executive Secretary